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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1045

WILLIAM LEIGHTON, a stockholder of Paramount Pictures Corporation, on behalf of himself and all others similarly situated and for and on behalf of Paramount Pictures Corporation,

Petitioner-Plaintiff,

—v.—

PARAMOUNT PICTURES CORPORATION, BARNEY BALABAN, EDWIN L. WEISL and PAUL E. MANHEIM,

Respondents-Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

WILLIAM LEIGHTON
Petitioner pro se
249 West 11th Street
New York 14, N. Y.

INDEX TO PETITION

PAGE

Petition for Writ of Certiorari 1

Jurisdiction on Petition for Certiorari 2

Questions Presented 2

Statement of the Case 4

Reasons Relied Upon for Granting the Writ of Certiorari 8

Conclusion and Prayer for Relief 11

INDEX TO APPENDIX

Constitutional Provisions, Statutes and Rules 1a-5a

Opinions of the District Court for the Southern District of New York 7a, 15a

Opinion of the Court of Appeals for the Second Circuit 32a

---

CASES CITED

Brown Shoe Co. v. United States, 370 U. S. 294 (1961) 10

Cohen v. Beneficial Industrial Loan Co., 337 U. S. 541 (1949) 34a

Donovan v. City of Dallas, 377 U. S. 408 (1963) 10

PAGE

Farmer v. Arabian American Oil Co., 285 F. 2d 720 (2d Cir.), cert. denied, 364 U. S. 824 (1960) 35a
Farmer v. Arabian American Oil Co., 379 U. S. 227 (1964) 9
Fielding v. Allen, 181 F. 2d 163 (2d Cir.), cert. denied sub nom. Ogden Corporation v. Fielding, 340 U. S. 817 (1950) 7a

J. I. Case v. Borak, 377 U. S. 426 (1963) 9

Kane v. Central American Mining & Oil Co., 235 F. Supp. 559 (S. D. N. Y., 1964) 9

Leighton v. Paramount Pictures Corporation, 377 U. S. 919 (1963) 9
Leslie One-Stop in Pennsylvania Inc. v. Audiofidelity, 33 F. R. D. 16 (S. D. N. Y. 1963) 35a

Miller v. Town of Suffield, 249 F. 2d 16 (2d Cir.), cert. denied 356 U. S. 978 (1958) 35a

N. A. A. C. P. v. Alabama, 357 U. S. 449 (1957) 10

Phelps v. Burnham, 327 F. 2d (2d Cir., 1964) 10, 23a

Rockaway Pix Theater Inc. v. Continental Distributors, Inc., 7 Fed. Rules Serv. 2d 83, 611, Case 2 (E. D. N. Y., 1963) 35a
Rudnicki v. McCormack, 210 F. Supp. 905 (D. R. I., 1962), appeal dismissed, 372 U. S. 226 (1963) 26a

Schlagenhauf v. Holder, U. S. District Judge, 379 U. S. 104 (1964) 8, 9

PAGE

United States v. F. M. Schaefer Brewing Co., 356 U. S. 227 (1956) 11-12

United States v. Onan, 190 F. 2d 1 (8th Cir.), cert. denied, 342 U. S. 869 (1951) 25a

United States v. United Mine Workers, 330 U. S. 258 (1947) 9, 36a

Willheim v. Murchison, 206 F. Supp. 733 (S. D. N. Y., 1962), appeal dismissed, 312 F. 2d 399 (2d Cir., 1963) 15a

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Petitioner-Plaintiff,

—v.—

PARAMOUNT PICTURES CORPORATION, BARNEY BALABAN, EDWIN L. WEISL and PAUL E. MANHEIM,

Respondents-Defendants.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner respectfully prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in this case on January 12, 1965. Such judgment affirmed orders of the District Court for the Southern District of New York entered in this case on December 23, 1963, March 11, 1964, and, assertedly on February 4, 1964. However, the record shows that no orders were entered by the District Court on February 4, 1964.

Opinions Below

Two opinions were handed down by the District Court on November 18, 1963 and March 2, 1964, and are unreported. These opinions are appended hereto, as are the other memorandum orders entered by the District Court in this action.

The opinion of the Court of Appeals was handed down on January 12, 1965 and is also appended hereto.

Jurisdiction

The jurisdiction of this Court to review the judgments below is invoked on the basis of 28 U. S. C. 1254(1).

Questions Presented

1. Whether the proceedings in the District Court are not vitiated and infected through the participation as counsel for the defendants of one Mark D. Geraghty who, at all times prior to January 7, 1964, was not a member of the Bar of the District Court.

2. Whether the proceedings in the District Court did not violate F. R. Civ. P. 6(b), 11, 12, 23(b) and (c), 55, 65(b), (c) and (d), such Rules having been disregarded, at the instance of the defendants, at each and every step during the course of such proceedings.

3. Whether the denial of petitioner's motion for the entry of default judgments against the individual defendants does not unconstitutionally and unlawfully deprive the nominal respondent Paramount Pictures Corporation

and petitioner of their property consisting of their right to such judgments, in violation of the Due Process Clause of the Fifth Amendment to the Constitution of the United States.

4. Whether, as applied in this case, Civil Rule 2 of the United States District Court for the Southern District of New York is not null and void for inconsistency with F. R. Civ. P. 6(b), 11, 12, 23(b) and (c), 41(b), 55 and 65(b), (c) and (d), contrary to F. R. Civ. P. 83.

5. Whether in the absence of any injunction running as to petitioner, the filing by petitioner of a motion under F. R. Civ. P. 11 and General Rule 5(b)(4) of the District Court, subsidiary to a motion under F. R. Civ. P. 60(b)(3) can constitute a "contempt" of the District Court, for which petitioner was fined $800, with the alternative of imprisonment.

6. Whether, in the absence of any statute of the United States enabling it to do so, the District Court may adjudge petitioner to be guilty of civil contempt without a trial, without a hearing and at the instance of attorneys whom petitioner had timely challenged as being disqualified from representing the individual respondents and the nominal defendant corporation, where the District Court has twice refused to hear and determine such challenge.

7. Whether the judgment of the Court of Appeals, which affirmed judgments of the District Court, should not be vacated for inconsistency with the record and because it rests on an ambiguous jurisdictional basis.

Constitutional Provision, Statutes and Rules

The case involves the Court of Appeals' construction of F. R. Civ. P. 83 and of the several Federal Rules of Civil Procedure referred to in Questions Presented (2), (3), (4) and (5). These are included in the appendix hereto, as are the local Civil and General Rules of the District Court, promulgated under the asserted authority of F. R. Civ. P. 83.

Statement of the Case

This is a stockholder's derivative action commenced by petitioner (plaintiff below) on October 8, 1963, as a stockholder of record of Paramount Pictures Corporation. The action was filed after the respondents (defendants below) refused to include in the corporation's proxy statement for 1963 petitioner's demand that action be taken by the shareholders as provided by F. R. C. P. 23(b).

In the words of the Court of Appeals, petitioner's complaint

> "appeared to charge that the individual defendants, directors of Paramount Pictures Corporation, wasted corporate assets and plundered the corporate treasury. (Petitioner) requested that various sums paid by Paramount be recovered from the individual defendants, that a receiver be appointed for Paramount, that various contracts to which Paramount was a party be cancelled, and that an injunction be issued against further payments by it without the permission of the stockholders. Jurisdiction was based on the Securities Exchange Act of 1934, 15 U. S. C. Section 78aa, and 'the postal statutes', 28 U. S. C. Section 1339."

The respondents have not joined issue whether by answering or by moving against the complaint within the time prescribed by the summons and F. R. Civ. P. 12. Instead the respondents suggested, and the District Court acceded, to a unique procedure that ignores F. R. Civ. P. 12 and that is said to be based on the District Court's local Civil Rule 2.

Thus, on October 29, 1963, the respondents obtained from the District Court an *ex parte* "stay of proceedings" and an indefinite extension of time within which to move or answer the complaint (App. 6a). The "stay" was in the nature of a temporary restraining order but was issued without security and without the observance of the procedural safeguards of F. R. Civ. P. 65(b). The respondents promptly removed the stay order from the Federal courthouse in Foley Square and kept it in their possession for two days. They made no attempt to serve petitioner whether on October 29, or on October 30, 1963. No affidavits of attempted but unsuccessful service were filed by the respondents.

On October 31, 1963, the respondents served the stay order upon petitioner and also filed that order with the Clerk of the District Court. The stay order was subsequently ruled by the District Court to have been effective between October 29 and November 18, 1963, i.e. for a period of 21 days (App. 23a).

Coupled with the stay order, the District Court also ordered petitioner to show cause, on three days' notice including Saturday and Sunday, why petitioner should not be required to post security of $100,000 under its local Civil Rule 2 in favor of the defendants. While procedure by Order to Show Cause is described by the District Court's General Rule 9(c)(4) to require "a clear and specific show-

ing by affidavit of good and sufficient reasons why procedure other than by notice of motion is necessary", in practice and in this case, the show cause procedure was twice used by the respondents in order to surprise and oppress petitioner.

On October 31, 1963, the respondents also entered their appearance below by filing a "Memorandum in support of motion to require plaintiff to post security". No formal notice of appearance was otherwise filed by the respondents. Contrary to F. R. C. P. 11 and 7(b)(2), the memorandum bore no manuscript signature of any attorney. It bore the typewritten names of Leonard Kaufman, as attorney for respondent Paramount, and of Whitney North Seymour, Jr., Mark D. Geraghty and James J. Hagen as being "of counsel" to the individual defendants. Of these persons, Mark D. Geraghty was not then a member of the Bar of the District Court.

On November 4, 1963, the District Court heard oral argument on respondents' "motion to require plaintiff (petitioner) to post security" and decision was reserved until November 18, 1963, when $2,000 security was imposed upon petitioner, in the nature of a penalty (App. 7a). An Order upon this decision was entered on December 23, 1963 (App. 8a), and it included a "stay" rather than an "injunction". No security was required of the respondents as a condition for the issuance of this "stay". By further order filed January 8, 1964 (App. 10a), the District Court denied petitioner's application for a certificate under the Interlocutory Appeals Act, 28 U. S. C. Sec. 1292(b), and, on January 9, 1964, the Court of Appeals also denied petitioner's application for leave to appeal, R. 72a. Nevertheless, petitioner filed a timely notice of appeal from the District Court's order of December 23, 1963 (App. 10a).

On November 13, 1963, the District Court entered an Order (App. 6a), striking from its motion calendar petitioner's motion for the disqualification of counsel for the individual respondents, for a preliminary injunction and for the appointment of a receiver. This matter was never restored to the motion calendar of the District Court because of the intervening "stay of proceedings" obtained by the respondents. Thereafter, the challenged counsel, Whitney North Seymour, Jr., Esq. continued to represent the individual defendants in the District Court and in the Court of Appeals and also assumed control of the nominal respondent corporation's defense of the action.

On January 22, 1964, the District Court entered orders (App. 11a), denying petitioner's motions to vacate the "stay", for the entry of default judgments against the respondents and for the reinstatement on its motion calendar of the motions which had been struck off by its order of November 13, 1963. The basis of petitioner's motion for the entry of default judgments against the respondents was the nullity of the District Court's order extending respondents' time to move or answer the complaint. Notice of appeal from these orders was filed on February 20, 1964 (App. 14a). These are the orders to which the Court of Appeals erroneously referred in the syllabus of its opinion as having been entered on "February 4, 1964".

On January 23, 1964, the District Court entered an Order, Judgment and Decree, dismissing the action as to petitioner only, and with prejudice (App. 13a). A notice of appeal from this order was filed on February 20, 1964 (App. 14a). However, the Court of Appeals failed to consider this final decision in its opinion.

On March 2, 1964, the District Court filed an opinion denying petitioner's motion to vacate the dismissal of the

complaint and, on the basis of an Order to Show Cause obtained by respondents on three days' notice, held petitioner in civil contempt for having concurrently sought the striking of "all pleadings, memoranda of law, affidavits, motions and other papers filed in this action by the defendants up to and including January 7, 1964; a reference to the Chief Judge of plaintiff's charges allegedly warranting disciplinary proceedings against a member of the bar of this court; and an order protecting him from 'further abuse of process by the defendants'." The basis of petitioner's motion was Mark D. Geraghty's practice of law in the District Court, in this case, without being a member of the Bar of the District Court. Orders were thereafter entered upon this opinion (App. 28a, 29a), and from these orders, a further notice of appeal was filed (App. 31a).

The record shows that Mark D. Geraghty was admitted to the Bar of the District Court on January 7, 1964, on motion of Whitney North Seymour, Jr. who is counsel of record for the individual respondents in the District Court and in the Court of Appeals.

Reasons Relied Upon for Granting the Writ

1. The Court of Appeals has sanctioned the District Court's enforcement of local Civil Rule 2 that is disruptive of the pattern of the Federal Rules of Civil Procedure and has so far sanctioned a departure by the District Court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. *Schlagenhauf* v. *Holder,* 379 U. S. 104, Supreme Court Rule 19(1)(b), last sentence. Under the purported authority of its Rule, the District Court dismissed the complaint upon the merits without the defendants' having joined issue.

2. The Court of Appeals has sanctioned the District Court's issuance of a "stay" based on the District Court's local Civil Rule 2, which stay is equivalent to an injunction but which was issued without observing the procedural safeguards of F. R. Civ. P. 65. Since the District Court's power to issue such a "stay" is said to rest on F. R. C. P. 83, certiorari should be granted to review this practice which has never received the approval of this Court, *Schlagenhauf* v. *Holder, supra.*

The Court of Appeals had previously refused to review by way of mandamus the practice complained of by petitioner, and this Court had denied certiorari to review such refusal, *Leighton* v. *Paramount Pictures Corp.*, 377 U. S. 919 (1963).

3. Disregarding the holdings of *J. I. Case* v. *Borak*, 377 U. S. 426, the Court of Appeals has sanctioned the arbitrary, capricious and discriminatory imposition upon petitioner of "security for costs" prior to joinder of issue by the defendants.

This imposition, said to be based on the District Court's local Civil Rule 2, was in an excessive and unjustified amount, twice the taxable costs allowed by this Court in *Farmer* v. *Arabian American Oil Co.*, 379 U. S. 227 (1964).

The District Court's arbitrary and capricious rulings in this case are in sharp contrast with its disposition of a similar case, *Kane* v. *Central American Mining & Oil Co.*, 235 F. Supp. 559 (1965), where security for costs in the amount of $250 under local Civil Rule 2 was imposed because of the plaintiff's non-residence of the District and only after joinder of issue by the defendants.

4. The Court of Appeals has misconceived the decision of this Court in *United States* v. *United Mine Workers*, 330

U. S. 258, 289-295 (1947) by failing to differentiate between civil and criminal contempt and has sustained, on the basis of its misconception, the District Court's order holding petitioner in civil contempt for the asserted violation of a "stay" issued by the District Court contrary to the procedural requirements of F. R. Civ. P. 65 and in excess of the District Court's powers under F. R. Civ. P. 83.

The judgment of the Court of Appeals ignores the decisions of this Court in *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449 (1957) and *Donovan* v. *City of Dallas,* 377 U. S. 408 (1963), both of which held that a finding of civil contempt must rest on a determination of the validity of the order said to have been violated.

5. The judgment of the Court of Appeals lacks a definite jurisdictional basis, appellate jurisdiction having been assumed *arguendo* by the Court of Appeals. This is contrary to *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 307 (1961) and cases therein cited.

The Court of Appeals' denial of petitioner's application for leave to appeal, pursuant to the Interlocutory Appeals Act, 28 U. S. C. 1292(b), the stay and security-for-costs order issued by the District Court under the asserted authority of F. R. Civ. P. 83, is based on the erroneous theory that such an order is not so appealable whereas an injunction issued by the District Court under the authority of F. R. Civ. P. 65 is appealable pursuant to that Act, 28 U. S. C. 1292(a).

Because of this error, the Court of Appeals failed to determine the basis of appellate jurisdiction. Previously, in *Phelps* v. *Burnham,* 327 F. 2d 812 (1964), the Court of Appeals erroneously assumed jurisdiction under the final decision statute, 28 U. S. C. 1291, to review a stay and security-for-costs order.

6. The judgment of the Court of Appeals is inconsistent with the record, since it fails to dispose of petitioner's appeal from the final decision of the District Court, entered in this case on January 23, 1964 (App. 13a), which dismissed petitioner's complaint before the respondents had joined issue. Under F. R. Civ. P. 41(b), this dismissal operates as an adjudication upon the merits. Thus, petitioner has been denied his right to appellate review of the District Court's final decision.

7. Contrary to the principles of 7 C. J. S. Section 16, the Court of Appeals has sanctioned the unauthorized practice of law of Mark Daly Geraghty in this case and has refused to require the District Court to make specific findings with respect thereto.

Prior to taking the appeal, petitioner did request the District Court to make such findings, in accordance with its Rules, and for making such request, petitioner was held in contempt by the District Court.

Petitioner invokes this Court's power of supervision over the lower courts because of the arbitrary, capricious and discriminatory manner of the contempt proceeding and the appellate review thereof.

8. The District Court had no power, under F. R. Civ. P. 83, to impose security for costs upon petitioner and stay all proceedings on his part because the respondents' willful default in failing to move against or answer the complaint entitled petitioner to the entry of default judgments against the respondents pursuant to F. R. Civ. P. 55 and 12.

The District Court's *ex parte* order extending respondents' time to so move or answer was null and void under the rationale of *United States* v. *F. M. Schaefer Brewing*

Co., 356 U. S. 227, the order having been procured by the respondents on October 29, 1963 under the "within time" provision of F. R. C. P. 6(b)(1) but filed by them with the Clerk of the District Court "out of time", on October 31, 1963.

The District Court ignored the *F. M. Schaefer* decision in denying petitioner's motion for the entry of default judgments against the respondents and the Court of Appeals, in its opinion, omitted a discussion of this point.

The District Court failed to take disciplinary action against the respondents for removing the *ex parte* order from the Federal Courthouse in Foley Square and for keeping said order in their possession for two days.

CONCLUSION

For the reasons above stated, the petition for certiorari should be granted. Petitioner prays that, if the writ is granted, the case be heard on the appendix to this petition which contains the entire record upon which petitioner relies in seeking the writ, with the exception of the complaint which the respondents neither answered nor moved against. Accordingly petitioner prays that the printing of the record under Rule 36 be dispensed with.

Respectfully submitted,

WILLIAM LEIGHTON
Petitioner pro se
249 West 11th Street
New York 14, N. Y.

April, 1965

APPENDIX

Constitutional Provision, Statutes and Rules Cited

Constitution of the United States
Fifth Amendment

> No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *

28 U. S. C. 1291: *Final decisions of district courts.*

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts * * *

28 U. S. C. 1292(a): *Interlocutory decisions.*

> (1) The courts of appeals shall have jurisdiction of appeals from interlocutory orders of the district courts * * * granting, continuing, modifying, refusing or dissolving injunctions * * *

28 U. S. C. 1339: *Postal matters.*

> The District Courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to the postal service.

15 U. S. C. 78aa: *Securities Exchange Act.*

> *Jurisdiction of offenses and suits.* Section 27. The district courts * * * shall have exclusive jurisdiction of violations of this title or the rules and regulations thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by this title or the rules and regulations thereunder.

18 U. S. C. 401: *Power of court*:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as— * * *

(3) disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

Federal Rules of Civil Procedure

Rule 6. *Time.* * * *

(b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if the request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; * * *

Rule 7. *Pleadings Allowed; Form of Motions.* * * *

(b) MOTIONS AND OTHER PAPERS. * * *

(2) The rules applicable to signing, captions and other matters of form of pleadings apply to all motions and other papers provided for by these rules.

Rule 11. *Signing of Pleadings.*

Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in

his individual name, whose address shall be stated. * * * If a pleading is not signed or is signed with intent to defeat the purpose of this rule, it may be stricken as sham and false and the action may proceed as though the pleading had not been served. For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action, * * *

Rule 12. *Defenses and Objections—When and How Presented—By Pleading or Motion—Motion for Judgment on Pleadings.*

(a) WHEN PRESENTED. A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, * * *

The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: * * *

(h) WAIVER OF DEFENSES. A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply except * * *

Rule 55. *Default.*

(a) ENTRY. When a party against whom a judgment for affirmative relief has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

Rule 65. *Injunctions.* * * *

(c) SECURITY. No restraining order or preliminary injunction shall issue except upon the giving of security

by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. * * *

(d) FORM AND SCOPE OF INJUNCTION OR RESTRAINING ORDER. Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; * * *

Rule 83. *Rules by District Courts.*

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules.

General Rules, U.S.D.C., S.D.N.Y.—Rule 5.

(a) The chief judge shall have charge of all matters relating to the discipline of members of the Bar. * * *

(b) The court may make an order in a disciplinary proceeding disbarring, suspending or censuring, or taking such other action as justice may require, with respect to a member of the Bar of this court * * *

(4) who is guilty of conduct unbecoming a member of the Bar of this court. Without limiting the generality of the foregoing, such misconduct shall be deemed to include fraud, deceit, malpractice, conduct prejudicial to the administration of justice, or violation of the canons of ethics of the American Bar Association or of the New York State Bar Association.

Rule 9.

(c) * * * (4) No order to show cause to bring on a motion will be granted except upon a clear and specific showing by affidavit of good and sufficient reasons why procedure other than by notice of motion is necessary.

Civil Rules, U.S.D.C., S.D.N.Y.—Rule 2.

The court, on motion or on its own initiative may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as it may designate. For failure to comply with the order the court may make such orders in regard to non-compliance as are just, and among others the following: An order striking out pleadings or staying further proceedings until the bond is filed or dismissing the action or rendering a judgment by default against the non-complying party.

7 C.J.S. Section 16:

PROCEEDINGS in a suit by a person not entitled to practice are a nullity and the suit may be dismissed. If the cause has proceeded to judgment, the judgment is void and will be reversed. Briefs presented on appeal by persons not licensed to practice in the appellate courts will not be considered.

Order Striking From Calendar Motion for Preliminary Injunction, for the Appointment of a Receiver and for the Disqualification of Counsel

Tr. 96

U.S.D.C., S.D.N.Y.
Filed: November 13, 1963

This motion is stricken from the calendar without prejudice to renewal, pending decision on motions now before the Court. So ordered.

/s/ THOMAS F. CROAKE
U.S.D.J.

November 12, 1963

Order to Show Cause on Motion for Security

Tr. 25-27

U.S.D.C., S.D.N.Y.
Filed: October 31, 1963

* * * * *

ORDERED that pending the hearing and determination of this motion all proceedings herein be stayed; and it is further

ORDERED that the time of all defendants to answer or make any motion with respect to the complaint herein is extended until 10 days after the hearing and determination of this motion, or the posting of security if ordered by the Court; and it is further

* * * * *

/s/ THOMAS F. MURPHY
U.S.D.J.

Dated, New York, N. Y.
October 29, 1963

* * * * *

Memorandum Opinion on Motion for Security

Tr. 98-100

#29404
U.S.D.C., S.D.N.Y.
Filed November 18, 1963

(CAPTION) Civil Action No. 63-Civ-2924

CROAKE, *District Judge*

MEMORANDUM

By order to show cause, defendants have brought on a motion for an order directing plaintiff (a) to give security in the amount of $100,000 pursuant to Section 627 of the Business Corporations Law of the State of New York for expenses which may be incurred in this action, (b) to give security in the amount of $5,000 pursuant to Rule 2 of the Civil Rules of this court to the extent security is not required under said Section 627, and (c) for a stay of all proceedings herein until the posting of the required security.

In light of the fact that the complaint is inartfully drawn by the plaintiff who appears *pro se*, it is difficult to ascertain the nature of the three "counts" asserted therein. Without in any way passing on the validity of the complaint, the court infers that the first and third counts purport to allege claims in the nature of stockholder derivative actions based upon alleged violations of the Securities Act of 1933, the Securities Act of 1934, and regulations thereunder.

For the application of Section 627 of New York Business Corporation Law, defendants rely upon *Fielding* v. *Allen*, 181 F. 2d 163 (2d Cir. 1950) *cert. denied sub nom.*

Ogden Corporation v. *Fielding*, 340 U. S. 817 (1950). That case makes clear, however, that Section 627 may only be applied in a federal action brought under the diversity jurisdiction. As it appears that plaintiff and at least some of the defendants are residents of the State of New York, there is no diversity jurisdiction in this case. Accordingly, branch (a) of the motion will be denied.

In view of the nature and circumstances of this litigation, however, the court will grant branch (b) of the motion to the extent that plaintiff will be required to post security in the amount of $2,000. Branch (c) of the motion is also granted.

Settle order on notice.

/s/ Thomas F. Croake
U.S.D.J.

Dated: New York, New York
November 14, 1963

Counter-Order

Tr. 109-110

U.S.D.C., S.D.N.Y.
Filed: December 23, 1963

* * * * *

Ordered, that the motion for security for costs pursuant to Rule 2 of the Civil Rules of the Federal District Courts for the Southern and Eastern Districts of New York, is granted and said security is fixed in the sum of $2,000; and it is further

ORDERED, that plaintiff is directed to furnish said security in the amount of $2,000 by depositing cash or United States Government bonds having a face value of $2,000 with the Clerk of this Court, or by filing a bond in said amount which complies with the provisions of Rule 31 of the General Rules of the United States District Courts for the Southern and Eastern District of New York with the Clerk of this Court, and it is further

ORDERED, that until the filing of the security aforesaid, all proceedings on the part of the plaintiff are stayed, without prejudice to plaintiff's right to file a motion in the Motion Part of this Court to vacate such stay, and it is further

ORDERED, that if said security in the sum of $2,000 is not filed pursuant to the provisions of this order within 15 days, after the service of a copy of this order with a notice of entry thereof upon the plaintiff, the Clerk is directed to enter an order dismissing this action upon submission of an order based upon an affidavit of non-compliance with the terms of this order upon five days' notice to the plaintiff.

/s/ THOMAS F. CROAKE
U.S.D.J.

Dated: New York, N. Y.
December 23, 1963

Order Denying Resettlement of Counter-Order

Tr. 132

U.S.D.C., S.D.N.Y.
Filed: January 8, 1964

The within application for resettlement of an order of this court entered in this action December 23, 1963, is denied. Said order is not considered an appropriate one for interlocutory appeal within the requirements of 28 U. S. C. 1292(b). So ORDERED.

/s/ THOMAS F. CROAKE
U.S.D.J.

Dated: New York, N. Y.
January 7, 1964

Notice of Appeal From Counter-Order

Tr. 133

U.S.D.C., S.D.N.Y.
Filed: January 22, 1964

Notice is hereby given that William Leighton, plaintiff herein, hereby appeals to the United States Court of Appeals for the Second Circuit from the Counter-Order entered in this action on December 23, 1963 and filed herein on that same day.

/s/ WILLIAM LEIGHTON
Plaintiff pro se
249 West 11th Street
New York 14, N. Y.

Dated: January 22, 1964

Memorandum Opinion and Order

Tr. 120A

U.S.D.C., S.D.N.Y.
Filed: January 22, 1964

Branch (a) of the within motion to vacate a stay of proceedings contained in the order of this court, dated December 23, 1963, is denied. The only ground asserted therefor is that the defendants procured the stay by "fraud" in that they were then in default in answering the complaint. Defendants, however, had received an extension of time to answer until after plaintiff posted security.

For the same reasons, branch (b) of the motion seeking default judgments is denied. The remaining branches of the motion are also denied because the bringing thereof was in violation of the aforesaid stay.

So Ordered.

/s/ Thomas F. Croake
U.S.D.J.

Dated: New York, N. Y.
January 22, 1964

Order Denying Application for Stay to Post Security

Tr. 149

U.S.D.C., S.D.N.Y.
Filed: January 22, 1964

The within application for a stay pending disposition of motions before this court is denied. One of said motions has been denied in a memorandum endorsement filed simultaneously herewith. No sufficient reason appears in the moving papers for a stay pending the disposition of the motion allegedly returnable February 4, 1964.

So Ordered.

/s/ Thomas F. Croake
U.S.D.J.

Dated: New York, N. Y.
January 22, 1964

Memorandum Extending Plaintiff's Time

Tr. 217

U.S.D.C., S.D.N.Y.
Filed: January 24, 1964

The within proposed order is returned to the Clerk's office of this court unsigned. On 1-10-64 this Court orally extended the time of plaintiff to post security to and including 1-14-64.

/s/ Thomas F. Croake
U.S.D.J.

Dated: New York, N. Y.
January 24, 1964

Order, Judgment and Decree

Tr. 218-19

(CAPTION)

U.S.D.C., S.D.N.Y.
Filed: January 23, 1964

UPON the reading of the affidavits of Whitney North Seymour, Jr., sworn to on January 15, 1964, Joseph B. Gordon, sworn to on January 15, 1964, and of John J. O'Neill, sworn to on January 15, 1964, and the order of the Hon. Thomas F. Croake dated December 23, 1963, and in accordance with the directions contained in said order of December 23, 1963, providing for the dismissal of this action for failure to post security in amount of $2,000.00 and upon submission of affidavit of non-compliance and upon five days' notice, it is

ORDERED, ADJUDGED AND DECREED that the within action be and the same hereby is dismissed, without prejudice, however, to the rights, if any, of any member of the class (except the named plaintiff William Leighton) on behalf of whom plaintiff purportedly brought this action.

/S/ THOMAS F. CROAKE
U.S.D.J., United States District Court for the Southern District of New York

Dated: New York, N. Y.
January 23, 1964

Notice of Appeal From Orders

Tr. 259

(Caption) Civil Action No. 63-Civ-2924

U.S.D.C., S.D.N.Y.
Filed: February 20, 1964

Notice is hereby given that plaintiff William Leighton hereby appeals to the United States Court of Appeals for the Second Circuit from

(1) the Order, filed January 22, 1964 herein, denying plaintiff's motion for the entry of default judgments against the defendants and from all parts of such Order, and

(2) the further Order, filed January 22, 1964 herein, denying an application for a stay, and from all parts of such order, and

(3) the Order, Judgment and Decree, filed January 23, 1964 herein, dismissing this action, and from all parts of such Order, Judgment and Decree.

/s/ William Leighton
Plaintiff pro se
249 West 11th Street
New York 14, N. Y.

Dated: New York, New York
February 20, 1964

Opinion of Sugarman, *D.J.*

Tr. 287-306

(Caption) Civil Action No. 63-Civ-2924

#29713
U.S.D.C., S.D.N.Y.
Filed: March 2, 1964

Sugarman, *D.J.*

On October 8, 1963 plaintiff William Leighton, *pro se*, filed a confusing document labeled a "complaint" against defendants Paramount Pictures Corporation, Barney Balaban, Edwin L. Weisl, and Paul E. Manheim, alleging *inter alia*:

> 6. (a) Plaintiff brings this action (i) individually on behalf of himself as a shareholder of Paramount; (ii) representatively on behalf of all shareholders similarly situated; (iii) derivatively on behalf of Paramount".

(Cf. *Willheim* v. *Murchison*, 206 F. Supp. 733 (S. D. N. Y., 1962), appeal dismissed, 312 F. 2d 399 (2d Cir. 1963).

This rambling admixture of fact, evidence, argument and citation of statutes and cases appears to state:

(1) a claim of waste and dissipation of corporate assets involved in the payment of expense allowances and fees to corporate officers and directors;

(2) a claim of breach of fiduciary obligations on the part of two of the directors relating to the purchase by Paramount of its own common stock on the open market, as disclosed to the stockholders; and

(3) a claim of conspiracy to defraud the corporation in the collusive instigation of a recent stockholders' suit in the New York State Supreme Court.

It seems that the "First Count" seeks relief on behalf of the corporate defendant and its shareholders against the individual defendants Balaban and Weisl—in the form of money judgments for sums allegedly paid by the corporate defendant to defendants Balaban and Weisl, injunction against future payments without prior approval of stockholders, appointment of a receiver of the corporate defendant, declaration of invalidity of any contracts pursuant to which payments had been made: that the "Second Count" seeks discovery of documents of, or in the alternative the appointment of a receiver for, the corporate defendant, and the taking of depositions of the individual defendants; and that the "Third Count" seeks a declaration of invalidity of certain releases from the corporate defendant to the individual defendants, a further money judgment on behalf of the corporate defendant against the defendant Balaban and judgment for the plaintiff against the individual defendants for one million dollars.

On October 29, 1963 the defendants procured an order from Judge Murphy that the plaintiff show cause on November 4, 1963 why he should not post security for expenses under section 627 of the Business Corporation Law of New York and for costs under Civil Rule 2 of this court and for a stay of further proceedings by the plaintiff until such security be posted by him. Judge Murphy stayed further proceedings until determination of the motion.

On the same day (October 29, 1963) the plaintiff served on all defendants by mail a motion returnable November 12, 1963 for a preliminary injunction, disqualification of individual defendants' counsel, for the appointment of a receiver of the defendant corporation and other relief.

When this motion came on before Judge Croake on November 12, 1963 it was stricken from the calendar without prejudice to a renewal after decision of the defendants' earlier motion for security, then pending before Judge Croake since November 4, 1963.

On November 18, 1963 Judge Croake filed his decision of the defendants' motion granting security for costs only under Civil Rule 2 and a stay. The entry of the order directed to be entered by Judge Croake in his said decision was deferred pending a determination of plaintiff's ultimately unsuccessful petition to the Court of Appeals for a writ of mandamus and prohibition against Judges Murphy and Croake.

On December 23, 1963 Judge Croake filed an order on the November 18, 1963 decision which required the plaintiff to deposit security of $2,000 (pursuant to Civil Rule 2 of this court), which order also stayed "all proceedings on the part of the plaintiff" until the filing of the security but "without prejudice to plaintiff's right to file a motion in the Motion Part of this Court to vacate such stay". This order also provided that upon proper proof that the security had not been posted within fifteen days, an order dismissing the plaintiff's action was to be entered.

On December 26, 1963 plaintiff procured an order from Judge Feinberg that the defendants show cause on January 7, 1964 (a) why the stay of proceedings by plaintiff should not be vacated, (b) for a default judgment against the defendants, or in the alternative (c) restoring the plaintiff's earlier motion (stricken on November 12, 1963 as aforesaid) for a preliminary injunction, disqualification of individual defendants' counsel, the appointment of a receiver of the corporate defendant and other relief.

On December 27, 1963 the plaintiff was personally served with a copy of Judge Croake's order of December 23, 1963 with notice of entry.

On December 29, 1963 the plaintiff sought to have Judge Croake resettle his order of December 23, 1963 to allow for an interlocutory appeal therefrom (28 U. S. C. 1292(b)). This application was denied by Judge Croake by an order entered January 8, 1964.

On January 7, 1964 Judge Bonsal (before whom Judge Feinberg's order to show cause of December 26, 1963 came on for hearing) referred plaintiff's said motion to Judge Croake.

On January 10, 1964 Judge Croake orally extended to January 14, 1964 the plaintiff's time to post the security required by the order of December 23, 1963.

On January 22, 1964, four things happened: (1) the plaintiff filed a notice of appeal from Judge Croake's order of December 23, 1963; (2) Judge Croake filed an order denying the plaintiff's motion (referred to him by Judge Bonsal on January 7, 1964 as aforesaid) to vacate the stay and for a default judgment, which order also denied plaintiff's alternative motion to restore his earlier motion (stricken on November 12, 1963 as aforesaid) for preliminary injunction, disqualification of individual defendants' counsel, the appointment of a receiver and other relief, as "being in violation of the aforesaid stay"; (3) plaintiff served a notice of motion returnable February 4, 1964 to vacate the order of December 23, 1963 as having been procured by the purported fraud of the individual defendants' counsel upon the court, and for other relief hereinafter discussed, which is one of the motions presently before me for

determination; and (4) plaintiff sought to procure from Judge Edelstein an order that the defendants be stayed, pending determination of plaintiff's application returnable February 4, 1964, from entering judgment for his failure to post security, which Judge Edelstein declined to grant but referred to Judge Croake, who forthwith denied the application and entered an order to that effect.

On January 23, 1964, Judge Croake signed, and the clerk entered, a judgment dismissing the plaintiff's complaint for failure to post the security of $2,000 pursuant to the order of December 23, 1963, such dismissal being without prejudice, however, to the rights of any of the members of the class on whose behalf the suit was purportedly brought, except the named plaintiff William Leighton.

On January 31, 1964 Judge Edelstein granted the defendants an order that the plaintiff show cause, also on February 4, 1964, why (1) the plaintiff William Leighton should not be punished for contempt for violating the provision in Judge Croake's order of December 23, 1963, staying proceedings by the plaintiff until the security was deposited by him, (2) the plaintiff William Leighton should not be perpetually enjoined and restrained from continuing, instituting or prosecuting without prior leave of court this or any other legal proceedings in any court against any of the defendants herein or against any judge who has participated in any of the proceedings herein or against any counsel for any of the parties; and (3) there should not be awarded to the defendants reasonable attorneys' fees to be paid by the plaintiff William Leighton. This is the second motion presently before me for resolution.

I.

The Plaintiff's Motion (#11 of February 4, 1963) to Vacate Judge Croake's Order of December 23, 1963 "and for Other Relief".

This motion seeks (a) the vacatur of the order of December 23, 1963 under F. R. Civ. P. 60(b)(3) which empowers the court to relieve a party from a final judgment or order because of the fraud, misrepresentation, or other misconduct of an adverse party; (b) that "all pleadings, memoranda of law, affidavits, motions and other papers filed in this action by the defendants up to and including January 7, 1964" be stricken under F. R. Civ. P. 11 which allows for the striking of a *pleading* under certain conditions; and (c) that there be referred "to the Chief Judge of the Court the matter of the practice of law in this case by Mark Daly Geraghty" also under F. R. Civ. P. 11 and under General Rule 5(b)(4) of this court, the latter of which governs unauthorized practice in this court. Alternative relief by way of vacatur of the judgment of dismissal entered January 23, 1964 as aforesaid is sought if such judgment shall have been entered (this alternative was anticipatory because when the motion was made on January 22, 1964 the judgment of dismissal had not yet been entered).

All of the relief sought by plaintiff in his motion is based solely on the facts: (a) that the name of Mark Daly Geraghty, an attorney then admitted to the bar of the State of New York and employed by the law firm representing the individual defendants (who was not admitted to the bar of this court until January 7, 1964) was appended to the memorandum of law submitted by said individual defen-

dants in support of the motion for security argued before Judge Croake on November 4, 1963, together with the names of two other lawyers in that firm duly admitted to the bar of this court since April 1953 and April 1963 respectively and (b) that Mr. Geraghty upon the call of the motion calendar on November 4, 1963 answered that counsel for said individual defendants was ready for argument which was later made by one of the duly admitted attorneys and that Mr. Geraghty accepted from plaintiff in the courtroom that day at the Judge's direction, service of plaintiff's papers in opposition to the motion for security.

It is difficult to conceive a more flimsy basis for the relief sought by the plaintiff. Even if there were a shadow of substance to the *nugae* which laintiff offers against counsel for the individual defendants, it ignores the presence throughout every phase of this litigation of the corporate defendant, for whose benefit the security was ordered and whose counsel, a member of the bar of this court since June 1941, cannot be charged with participation in the "fraud".

The very statement of the trivia constituting plaintiff's contentions requires that his motion be and it is in all respects denied.

II.

THE DEFENDANTS' MOTION (#38 OF FEBRUARY 4, 1964) THAT PLAINTIFF (A) BE PUNISHED FOR CONTEMPT FOR VIOLATING THE STAY IN THE ORDER OF DECEMBER 23, 1963; (B) BE PERPETUALLY ENJOINED FROM FURTHER PROCEEDING IN THIS OR ANY OTHER COURT AGAINST DEFENDANTS, JUDGES, COUNSEL FOR PARTIES; AND (C) PAY DEFENDANTS' REASONABLE COUNSEL FEES.

A.

The defendants' motion seeks an order that "plaintiff be judged in contempt for violating the stays of this Court."

The first of the "stays" referred to is that contained in the order to show cause granted by Judge Murphy on October 29, 1963, returnable November 4, 1963, which "ORDERED that pending the hearing and determination of this motion, all proceedings herein be stayed". That order to show cause was personally served on plaintiff on October 31, 1963. Judge Croake heard argument of that motion on November 4, 1963 and filed his determination thereof on November 18, 1963. The only action taken by plaintiff in the suit between October 29 and November 18, 1963, was the mailing of his notice of motion for a preliminary injunction, a receiver, disqualification of the attorneys for the individual defendants and other relief, on October 29, 1963, two days before he was personally served with a copy of Judge Murphy's order. In any event, Judge Croake struck the motion on November 12, 1963 without prejudice to a renewal thereof after he decided the defendants' motion for security, previously argued before him on November 4, 1963. On these facts I fail to discern any contuma-

cious conduct on plaintiff's part respecting the stay granted by Judge Murphy on October 29, 1963, which expired by its own language on November 18, 1963 when Judge Croake filed his decision determining that motion.

No different result would obtain even if it be said that the defendants' motion for security was not "determined" until the entry of Judge Croake's order of December 23, 1963, since defendants' moving papers indicate that the only proceedings prosecuted by plaintiff between November 18, 1963 and December 23, 1963 were the proceedings in the Court of Appeals whereby plaintiff attempted, albeit without success, to test, by petition for a writ of mandamus and prohibition the validity of the stay granted by Judge Murphy, the alleged violation of which is the basis of this part of the relief now sought by defendants.

Where, as here, the validity of a stay in an order thought to be non-appealable (cf. *Phelps* v. *Burnham*, 327 F. 2d 812 (2d Cir. Feb. 13, 1964)) is brought into question by a motion in the Court of Appeals for a writ of mandamus or prohibition, it would be absurd to hold that such attempt is itself a contemptuous violation of the very order being challenged. Defendants' motion to punish plaintiff for violating the stay in Judge Murphy's order to show cause of October 29, 1963 is denied.

The second of the "stays" referred to is that contained in Judge Croake's order of December 23, 1963 which "ORDERED, that until the filing of the security aforesaid, all proceedings on the part of the plaintiff are stayed, without prejudice to plaintiff's right to file a motion in the Motion Part of this Court to vacate such stay". That order was not served upon plaintiff until December 27, 1963.

Defendants present two instances of alleged violations of that stay by plaintiff since December 27, 1963. The first is an unsuccessful application made by plaintiff on January

15, 1964 to the Court of Appeals to stay the dismissal of his complaint and for a rehearing of his earlier unsuccessful application for a writ of mandamus or prohibition against Judge Croake (which had been coupled with plaintiff's application for a like writ against Judge Murphy) but upon the new grounds of the same "fraud" constituting the basis of plaintiff's companion motion, herein denied *supra*. I can read this motion as no more than an attempt on plaintiff's part to prevent the implementation, by a judgment of dismissal of his complaint, of the order of December 23, 1963 and thus an effort, again unsuccessful, to attack the validity of the stay in that order. As such it is indistinguishable from plaintiff's kindred attempt to vitiate the stay in Judge Murphy's order.

Accordingly, defendants' motion to punish plaintiff for violating the stay in Judge Croake's order of December 23, 1963 by moving in the Court of Appeals to stay the dismissal of his complaint and for a rehearing on his petition for a writ of mandamus and prohibition directed to Judge Croake is denied.

The second alleged instance of violation by plaintiff of the stay in the order of December 23, 1963 is the plaintiff's motion (#11 of February 4, 1964) hereinabove denied. There plaintiff sought much more than merely the vacatur of the order of December 23, 1963 or the judgment of dismissal based thereon. Whether properly or not, he sought the striking of "all pleadings, memoranda of law, affidavits, motions and other papers filed in this action by the defendants up to and including January 7, 1964"; a reference to the Chief Judge of plaintiff's charges allegedly warranting disciplinary proceedings against a member of the bar of this court: and an order protecting him "from abuse of process by the defendants".

After plaintiff's default in posting the security by the extended date of January 14, 1964 he had only one avenue of relief open to him—"a motion in the Motion Part of this Court to vacate such stay".

Having deliberately chosen by seeking entirely unrelated relief, to flout the restraint imposed upon him for failure to comply with the requirement that he post security, he did so at his own peril.

The defendants' motion to punish plaintiff for civil contempt in violating the stay in Judge Croake's order of December 23, 1963 by moving, by his notice of motion of January 22, 1964 (motion #11 of February 4, 1964) for relief other than to vacate the stay in said order, is granted.

Plaintiff is fined the sum of $800 to be paid to the clerk of this court within ten days from the date of the service upon him of a copy of the order to be entered hereon with notice of entry, otherwise plaintiff to be committed to the custody of the Attorney General to be imprisoned until the fine is paid or plaintiff is otherwise discharged according to law.

The clerk of this court upon receipt of said fine shall pay the same over to the moving defendants as follows: $400 to the corporate defendant and $400 to the individual defendants jointly, as reimbursement to the defendants for their expenses in resisting plaintiff's motion (#11 of February 4, 1964) hereinabove denied.

Plaintiff's demand for a jury trial of his contempt is denied. *United States* v. *Onan*, 190 F. 2d 1 (8th Cir. 1951), *cert. denied*, 342 U. S. 869 (1951).

B.

The defendants' motion next seeks an order "perpetually enjoining and restraining the plaintiff . . . from continuing, instituting or prosecuting, without prior leave of court,

this or any other legal proceeding in any court against any of the defendants herein or against any judge who has participated in any of the proceedings herein or against any counsel for any of the parties".

Defendants cite *Rudnicki* v. *McCormack*, 210 F. Supp. 905 (R. I. and Mass., 1962), appeal dismissed, 372 U. S. 226 (1963), as authority for the sweeping restraint which they seek. That case falls far short of achieving the goal which defendants claim for it.

The decision of Judge Gignoux first affirmatively concludes, on defendants' motion therefor, that the complaints failed to state claims under the Civil Rights Act. In the case at bar the sufficiency of the complaint has not been tested or for that matter even briefed by the parties.

Further, the facts in *Rudnicki* demonstrated an appalling abuse of judicial process far more aggravated than anything set forth by defendants here. If the present suit is merely the rehash of matters heretofore litigated by the parties, the affirmative defense of res judicata or any other matter constituting an avoidance may be availed of. F. R. Civ. P. 8(c).

Finally, the limit of the restraint in *Rudnicki* was as to actions "against any state or federal judge, officer or employee for actions taken in the course of their official duties as such judge, officer or employee", a far less inclusive orbit than that here proposed by defendants. While this court has its share of *pro se* litigants who sue judges for ruling against them, this plaintiff's attempt to mandamus or prohibit Judges Murphy and Croake as hereinabove recounted does not yet put him in that class.

While it may be that plaintiff, since May 1960 when he first acquired .0003% of the corporate defendant's stock, has plagued defendants and the Securities and Exchange Commission with demands and accusations and has brought

and tried to intervene in lawsuits against them, defendants have not persuaded me that I have the power upon the facts disclosed herein to gag plaintiff as they request.

This branch of defendants' motion is denied.

C.

The defendants' motion finally seeks an order "awarding reasonable attorneys' fees in favor of defendants to be paid by plaintiff".

Every one of the cases cited by defendants[1] in support of this branch of their motion involved an allowance of counsel fees after trial or a reservation of the question of an allowance until after trial and in either instance only upon a determination that the claim made or defense interposed was unfounded or maintained in bad faith, vexatiously, wantonly or for oppressive reasons.

The defendants' *ipse dixit* at this stage of the case of plaintiff's motives in bringing the suit are insufficient upon which to order the assessment demanded.

This branch of defendants' motion is denied.

Settle a separate order on plaintiff's motion and a separate order on defendants' motion in conformity with this decision.

/s/ SIDNEY SUGARMAN
United States District Judge

Dated: New York, New York
February 27, 1964

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[1] Kansas City Southern Ry. Co. v. Guardian Trust Co., et al., 281 U.S. 1 (1930); Rolax v. Atlantic Coast Line Ry. Co., 186 F. 2d 473 (4th Cir. 1951); Gasan v. Vadsco Sales Corp., 6 F. Supp. 568 (E.D.N.Y. 1934).

Order Denying Plaintiff's Motion

Tr. 310-311

(*Caption*) Civil Action No. 63-Civ-2924

U.S.D.C., S.D.N.Y.
Filed: March 11, 1964

Plaintiff *pro se* William Leighton, having moved this Court by notice of motion dated January 22, 1964 for an order vacating, pursuant to Rule 60(b)(3) F. R. C. P., an order of the Honorable Thomas F. Croake, dated December 23, 1963, an order pursuant to Rule 11 F. R. C. P. striking all pleadings, memoranda of law, affidavits, motions and other papers filed in this action by defendants up to and including January 7, 1964 and an order pursuant to Rule 11 F. R. C. P. and General Rules 5(b)(4) of the General Rules of the United States District Court for the Southern District of New York, referring to the Chief Judge of the Court the matter of the practice of law in this case by Mark Daly Geraghty,

Now, upon reading and filing of said notice of motion, dated January 22, 1964, * * * and due deliberation having been had by the Court and a decision having been rendered by the Court on February 27, 1964,

Now, on motion of Messrs. Simpson Thacher & Bartlett and Leonard Kaufman, Esq., it is

ORDERED that said motion be and the same hereby is denied in all respects with prejudice.

/s/ SIDNEY SUGARMAN
U.S.D.J.

Dated: New York, N. Y.
March 11, 1964

Order Adjudging Plaintiff in Contempt

Tr. 313-315

(CAPTION)

U.S.D.C., S.D.N.Y.
Filed: March 11, 1964

Defendants Paramount Pictures Corporation, Barney Balaban, Edwin L. Weisl and Paul E. Manheim, having moved this Court by order to show cause dated January 31, 1964, for an order, among other things, holding plaintiff William Leighton in contempt of court because of his misconduct in violating the provisions of the order of the Honorable Thomas F. Croake, made on December 23, 1963, staying all proceedings on the part of plaintiff until the filing of security as specified in said order,

Now, upon reading and filing of said order to show cause, dated January 31, 1964, * * * and due deliberation having been had by the Court and a decision having been rendered by the Court on February 27, 1964 containing the Court's findings of fact and conclusions of law,

Now, on motion of Messrs. Simpson Thacher & Bartlett and Leonard Kaufman, it is

ORDERED that the said William Leighton is adjudged to be guilty of contempt of this Court in that he violated the stay contained in the order of Judge Croake entered on December 23, 1963 by moving by his notice of motion dated January 22, 1964 (Motion No. 11 of February 4, 1964) for relief other than to vacate the stay in said order; and it is further

ORDERED that William Leighton be and is fined the sum of $800.00 to be paid to the Clerk of the United States District Court for the Southern District of New York in Room 601 within ten (10) days from the date of the service upon him of a copy of this order with notice of entry thereof; and it is further

ORDERED that the Clerk of this Court upon receipt of said fine shall pay the sum over to the moving defendants as follows: $400.00 to Paramount Pictures Corporation and $400.00 to Barney Balaban, Edwin L. Weisl and Paul E. Manheim jointly, as reimbursement to the defendants for their expenses in resisting plaintiff's motion (No. 11 of February 4, 1964); and it is further

ORDERED that if the plaintiff fails to pay the said fine of $800.00 in the manner and within the time provided for in this Order, the United States Marshal for the Southern District of New York is hereby directed to arrest William Leighton and commit him to the custody of the Attorney General of the United States, and said William Leighton is to be imprisoned until such time as the fine hereinabove provided for is paid or said William Leighton is otherwise discharged according to law; and it is further

ORDERED that except as hereinabove ordered the motion is denied.

/s/ SIDNEY SUGARMAN
U.S.D.J.

Dated: New York, N. Y.
March 11, 1964

Notice of Appeal From Order

Tr. 323

(CAPTION)

U.S.D.C., S.D.N.Y.
Filed: March 20, 1964

Notice is hereby given that plaintiff William Leighton hereby appeals to the United States Court of Appeals for the Second Circuit from

(a) the Order, filed herein on March 11, 1964, denying plaintiff's motion under F. R. Civ. P. 60(b)(3) and other relief, and from all parts of such Order, and

(b) the further Order, filed herein on March 11, 1964, adjudging plaintiff to be guilty of contempt of this Court, and from all parts of such Order.

/s/ WILLIAM LEIGHTON
Plaintiff pro se
249 West 11th Street
New York 14, N. Y.

Dated: New York, New York
March 20, 1964

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 14—September Term, 1964.

(Argued September 24, 1964 Decided January 12, 1965.)

Docket No. 28831

WILLIAM LEIGHTON,

Plaintiff-Appellant,

—v.—

PARAMOUNT PICTURES CORPORATION, BARNEY BALABAN, EDWIN WEISL and PAUL E. MANHEIM,

Defendants-Appellees.

Before:

MOORE, SMITH and KAUFMAN,

Circuit Judges.

Appeal from a series of orders in the District Court for the Southern District of New York requiring plaintiff to post security of $2,000 and staying further proceedings on his part until security was posted; Thomas F. Croake, *Judge*, December 23, 1963; denying plaintiff's motions to vacate the stay, for entry of default judgment against defendants, to strike defendants' defenses for misconduct of counsel, for a preliminary injunction and for the appointment of a temporary receiver for the corporate defendant;

Thomas F. Croake, *Judge*, February 4, 1964; and adjudging plaintiff in contempt for failure to comply with the terms of the stay issued by Judge Croake, Sidney Sugarman, *Judge*, March 11, 1964.

Affirmed.

WILLIAM LEIGHTON, *plaintiff-appellant pro se.*

LEONARD KAUFMAN, New York, New York, *for Defendant-Appellee, Paramount Pictures Corporation.*

WHITNEY NORTH SEYMOUR, JR., New York, New York (Simpson, Thacher & Bartlett, New York, New York), *for Defendants-Appellees, Barney Balaban, Edwin L. Weisl and Paul E. Manheim.*

MOORE, *Circuit Judge*:

On October 8, 1963, Leighton (appellant) began a shareholder's derivative action by filing a vague and conclusory complaint which appeared to charge that the individual defendants, directors of Paramount Pictures Corporation, wasted corporate assets and plundered the corporate treasury. Leighton requested that various sums paid by Paramount be recovered from the individual defendants, that a receiver be appointed for Paramount, that various contracts to which Paramount was a party be cancelled, and that an injunction be issued against further payments by it without the permission of the stockholders. Jurisdiction was based on the Securities and Exchange Act of 1934, 15 U. S. C. §78aa, and "the postal statutes." 28 U. S. C. §1339.

Leighton argues that a variety of errors was committed in the decisions on the various aspects of this litigation as it proceeded in the trial courts. Assuming *arguendo* that certain of the orders appealed from were appealable under the "collateral order" doctrine of *Cohen* v. *Beneficial Industrial Loan Co.*, 337 U. S. 541 (1949), we find no merit in any of Leighton's contentions.

On December 23, 1963, Judge Croake ordered Leighton to post $2,000 as security for expenses pursuant to Rule 2, Civil Rules for the Southern and Eastern Districts.[1] This order also stayed "all proceedings on the part of the plaintiff" until security was posted but "without prejudice" to Leighton's right to file a motion to vacate the stay.

Rule 2 clearly empowered the District Court to compel security for costs in this derivative suit. This Rule does not attempt, contrary to the direction of Fed. R. Civ. P. 83, to avoid the procedural requirements incident to temporary injunctions issued under Fed. R. Civ. P. 65, but serves only to implement a limited grant of judicial control over the administration of a lawsuit. A temporary injunction, on the other hand, preserves the entire status quo between the parties and often serves as the equivalent of an adjudication of the merits.

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[1] *Rule 2—Security for Costs*

The court, on motion or on its own initiative, may order any party to file an original bond for costs or additional security for costs in such an amount and so conditioned as it may designate. For failure to comply with the order the court may make such orders in regard to non-compliance as are just, and among others the following: an order striking out pleadings or staying further proceedings until the bond is filed or dismissing the action or rendering a judgment by default against the non-complying party.

Nor did the imposition of the stay and security requirement before the parties joined issue constitute an abuse of judicial discretion. Security may be required and the order enforced even where a plaintiff's claim has some merit. *Leslie One-Stop in Pennsylvania Inc.* v. *Audiofidelity Inc.*, 33 F. R. D. 16 (S. D. N. Y. 1963). Leighton's status as a *pro se* litigant in no way of itself impugns the character of this litigation but under Rule 2 a court may take all the pertinent circumstances into account including the conduct of the litigants and the background and purpose of the litigation. *Miller* v. *Town of Suffield*, 249 F. 2d 16 (2d Cir. 1957), *cert. denied*, 356 U. S. 978 (1958). Here Leighton was an habitual *pro se* litigant whose claims were often conclusory and lacking in legal merit. The amount of security required is relatively modest and Leighton has failed to show that he would be financially unable to post the required amount. The security requirement and stay thus represent reasonable measures designed to further the effective administration of this suit and do not unduly prejudice Leighton in the pursuit of his claim. *Farmer* v. *Arabian Amer. Oil Co.*, 285 F. 2d 720 (2d Cir.), *cert. denied*, 364 U. S. 824 (1960); *Rockaway Pix Theater Inc.* v. *Continental Distrib. Inc.*, 7 Fed. Rules Serv. 2d 83, 611, Case 2 (E. D. N. Y. 1963).

On March 2, 1964, Leighton was held in contempt of the stay by Judge Sugarman. 63 Civ. 2924, S. D. N. Y. This contempt citation grew out of a motion made by Leighton on January 22, 1964, to strike all defenses "filed in this action by the defendants up to and including" January 7th because of the alleged misconduct of the individual defendants' counsel in permitting an attorney not admitted to the Bar of the District Court to participate in the prepara-

tion of their briefs. On the merits this contention is insubstantial because counsel could have been admitted *pro hac vice,* since his participation in the case beyond his research function seems to have been minimal and since the motion ignores the continuous participation in the case of the corporate defendant's counsel. In any event, as Judge Sugarman observed, Leighton disobeyed the express mandate of the stay by his motion because the relief requested went far beyond mere vacatur of the security and stay order of December 23, 1963. It is axiomatic that a court order must be obeyed, even assuming its invalidity, until it is properly set aside. *United States* v. *U. M. W.*, 330 U. S. 258, 289-295 (1947).

The remainder of Leighton's arguments have been considered but do not require discussion.

Affirmed.

Office-Supreme Court, U.S.
FILED
MAY 7 1965
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1045

WILLIAM LEIGHTON, a stockholder of Paramount Pictures Corporation, on behalf of himself and all others similarly situated and for and on behalf of Paramount Pictures Corporation,

Petitioner-Plaintiff,

v.

PARAMOUNT PICTURES CORPORATION, BARNEY BALABAN, EDWIN L. WEISL and PAUL E. MANHEIM,

Respondents-Defendants.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS-DEFENDANTS PARAMOUNT PICTURES CORPORATION, BARNEY BALABAN, EDWIN L. WEISL AND PAUL E. MANHEIM

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INDEX

	PAGE
The Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of the Case	2
Argument	6
Conclusion	10

TABLE OF CITATIONS

In Re Debs, 158 U. S. 564 (1895)	9
Landis v. *North American Co.*, 299 U. S. 248 (1936)	8
Leighton v. *Paramount Pictures Corporation*, 377 U. S. 919 (1964)	3
McCrone v. *U. S.*, 307 U. S. 61 (1939)	9
Michaelson v. *U. S.*, 266 U. S. 42 (1924)	9
Miller v. *Town of Suffield*, 249 F.2d 16 (2nd Cir. 1957) *cert. denied*, 356 U. S. 978 (1958)	8
Zeth v. *Pennsylvania Railroad Company*, 7 F.R.D. 612 (E.D. Pa. 1947)	7

Rules

Rule 2 of the Civil Rules of the United States District Courts of the Southern and Eastern Districts of New York	7
Rule 6 Federal Rules of Civil Procedure	6
Rule 83 Federal Rules of Civil Procedure	7

Treatises

3 Barron & Holtzof, *Federal Practice and Procedures*	7
6 Moore's *Federal Practice*	7

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The Opinions Below

Two opinions were rendered by the United States District Court for the Southern District of New York with respect to the matters raised in this petition. One, by Honorable Thomas F. Croake, United States District Judge, was filed on November 18, 1963, and the other by

Honorable Sidney Sugarman, United States District Judge, was filed on March 2, 1964. Neither opinion is reported but may be found in petitioner's Appendix beginning at pages 7a and 15a, respectively.

An opinion of the United States Court of Appeals for the Second Circuit, Moore, J., was filed on January 12, 1965 and is reported at 340 F. 2d 859.

Jurisdiction

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. §1254(1).

Questions Presented

Although petitioner asserts seven purported questions, we believe that there are no meritorious questions whatsoever raised on the petition.

Statement of the Case

By reason of innumerable factual distortions and legal conclusions found in the "Statement of the Case" in petitioner's brief, it is necessary for us to incorporate in this brief a short resume of the facts.

This action, purportedly a stockholder's derivative suit, instituted by petitioner as a *pro se* litigant, comes before this Court by way of petition for writ of certiorari for the second time. The first petition for a writ of certiorari was filed in March, 1964 and sought review of an order of the United States Court of Appeals for the Second Circuit denying petitioner leave to file petitions for writs of mandamus and prohibition directed to the United States

District Court for the Southern District of New York in connection with orders made in that Court by Honorable Thomas F. Croake and Honorable Thomas F. Murphy, United States District Court Judges. The underlying legal questions raised earlier are substantially identical to the questions now raised. The first petition was denied on April 27, 1964, *Leighton* v. *Paramount Pictures Corporation*, 377 U. S. 919.

This action was instituted in October, 1963. The complaint contained a series of confusing allegations which seemed to be an attempt to state a derivative cause of action for certain wrongdoings on the part of the individual respondents-defendants. Respondents, familiar with the history of petitioner as a *pro se* litigant, moved, by order to show cause, to require petitioner to post security for costs before proceeding further in the action. The order to show cause was signed by Judge Thomas F. Murphy prior to the expiration of respondents' time to move against or answer the complaint and contained a provisions staying proceedings pending the determination of the motion for security and extending the time of respondents to answer the complaint until ten days after either the determination of the motion for security or the posting thereof if ordered by the Court. Subsequently, Judge Thomas F. Croake granted respondents-defendants' motion. An order dated December 23, 1963, directed petitioner to post security in the amount of $2,000 and further provided:

> "ORDERED, that until the filing of the security aforesaid, all proceedings on the part of plaintiff are stayed without prejudice to plaintiff's right to file a motion in the Motion Part of this Court to vacate such stay."

This language was actually proposed in a form of order submitted by the petitioner and adopted by the Court.

Upon failure of petitioner to post security Judge Croake dismissed this action with the following language:

> "ORDERED, ADJUDGED AND DECREED that the within action be and the same hereby is dismissed, without prejudice, however, to the rights, if any, of any member of the class (except the named plaintiff William Leighton) on behalf of whom plaintiff purportedly brought this action."

Subsequent to Judge Murphy's order containing the stay provision, which was signed on October 29, 1963, petitioner made several motions and applications in the District Court and instituted proceedings in the Court of Appeals, ostensibly for the purpose of vacating the stay but also seeking additional and varied relief.

Following the order made by Judge Croake directing the posting of security and staying proceedings, petitioner made a number of additional applications in the Court of Appeals with respect both to the order of October 29, 1963 and the order of December 23, 1963. Finally, on January 22, 1963, the day before the action was dismissed, petitioner made an omnibus motion in the District Court, seeking vacatur of the December 23, 1963 order, an order striking all papers filed by defendants, and an order referring to the Chief Judge of the District Court the alleged misconduct of junior counsel associated with the attorneys for individual respondents.

Respondents thereupon, by order to show cause dated January 31, 1964, moved the District Court to punish petitioner for civil contempt by reason of his violation of the stay provisions of the December 23, 1963 order of

Judge Croake. Notice of the motion was given to petitioner by service of the order to show cause on January 31, 1964. A hearing on the motion was held before Judge Sidney Sugarman on February 4, 1964, at which petitioner attended and was heard extensively by the Court. On March 2, 1964, Judge Sugarman filed an opinion finding petitioner had contumaciously violated the order of Judge Croake dated December 23, 1963, and imposing on him a fine of $800. An order and judgment was entered on March 12, 1964 implementing that decision.

Immediately thereafter the first petition for a writ of certiorari to this Court was filed. In connection with that petition two applications were made to stay the operation of the judgment of contempt, one to Mr. Justice Harlan and another to the Chief Justice. The applications were denied on March 16, 1964 and March 25, 1964, respectively.

Appeals were thereafter taken from (a) the order of December 23, 1963 requiring security; (b) an order of January 22, 1963 denying petitioner's motion to vacate the stay provision of Judge Croake's order and seeking other relief; (c) the order and judgment of January 23, 1964 dismissing this action against petitioner; and (d) the orders and judgment of March 12, 1964 holding petitioner in contempt of court and denying his omnibus motion.

The Court of Appeals for the Second Circuit filed its affirmance in an opinion dated January 12, 1965 and petitioner turns to this Court again.

ARGUMENT

There is no Colorable Question of Law Presented on this Petition

To state this case in its simplest terms, the District Court extended defendants' time to move or answer, ordered petitioner to post security for costs in the amount of $2,000, and stayed all proceedings in the action pending the posting of such security. Petitioner failed to post security and ultimately judgment was entered dismissing the action. Notwithstanding the order staying proceedings, petitioner made a motion seeking various forms of relief totally unrelated to the stay order itself. Respondents moved for an order holding petitioner in civil contempt, and after a hearing the District Court entered such order and fined petitioner $800. Despite petitioner's multitudinous diversionary applications in various courts at every stage of these proceedings, the basic procedure followed below was entirely proper and fully warranted.

Validity of the Order Extending Defendants' Time to Move or Answer

On October 29, 1963, prior to the expiration of the time within which defendants were required to answer the complaint in this action, they obtained an *ex parte* extension of time pursuant to Rule 6(b)(1) of the Federal Rules of Civil Procedure in the order signed by Honorable Thomas F. Murphy as part of the motion for security. Petitioner now contends that the order was invalid because, after it was signed, it was removed from the courthouse while defendants attempted to serve it per-

sonally on petitioner, who is not a lawyer, who worked during the day, and who used his residence address instead of a daytime office address on his papers. He argues that this action put the defendants in default and says he is entitled to judgment accordingly. The argument hardly requires a response. It is abundantly clear that the extension of time for defendants to move against or answer the complaint was fully within the power of the Court to grant, and that the granting of such extension was in no way affected by the necessity of making a difficult service and obtaining an admission thereof prior to the filing of the order with the Motion Clerk.

Validity of the Order Directing the Posting of Security

The order extending the time to move or answer also brought on for argument a motion to require petitioner to post security for costs before launching into extensive proceedings in the action. The motion also sought a stay of proceedings pending the posting of such security. Pursuant to Local Rule 2 of the Civil Rules of the United States District Courts of the Southern and Eastern Districts of New York, Judge Thomas F. Croake made an order requiring petitioner to post security in the amount of $2,000, and staying proceedings on his part, save his right to seek to vacate the order, pending the posting of such security.

The local Rule providing for security in appropriate cases is plainly authorized by Rule 83 of the Federal Rules of Civil Procedure, 6 *Moore's Federal Practice*, page 1328, §54.73 (2d edition); see *Zeth* v. *Pennsylvania Railroad Company*, 7 F.R.D. 612 (E.D. Pa. 1947); 3 Bar-

ron & Holtzof, *Federal Practice and Procedures*, §1198 (Wright edition) and the rule has been frequently exercised. *E.g., Miller* v. *Town of Suffield*, 249 F. 2d 16 (2nd Cir. 1957) *cert. denied*, 356 U. S. 978 (1958). The Court of Appeals in its opinion below held the amount of security required to be a reasonable and proper exercise of the District Court's discretion in the light of petitioner's posture as "an habitual *pro se* litigant whose claims were often conclusory and lacking in legal merit" and there seems no valid reason to further review that discretion in this Court.

The stay of proceedings incorporated in the order requiring security was also an entirely proper exercise of the inherent right of the District Court to administer the proceedings before it. That power has long been recognized by this Court. *Landis* v. *North American Co.*, 299 U. S. 248 (1936).

On January 23, 1964 the action below was dismissed when petitioner failed to post security in accordance with the provisions of the order of December 23, 1963. The dismissal was expressly without prejudice to the institution of an action by any other stockholder. No such action has been instituted.

Validity of the Order Adjudging Petitioner in Contempt

On January 22, 1964 petitioner moved for relief far beyond the vacatur of the December 23, 1963 order directing him to post security. In his motion he sought varied relief completely unrelated to any request to vacate the security order and the stay provisions therein, including an order striking papers filed by counsel for defendants

and seeking to refer to the Chief Judge the propriety of practice of one of the junior counsel. Respondents moved by order to show cause for an order holding petitioner in contempt by reason of his violation of the December 23, 1963 order. Notice of the motion was given to petitioner five days prior to the return day. Petitioner appeared on the return day and extensively argued his position before the Court. After affording this full hearing, the District Court in a careful opinion concluded that petitioner had violated the order of December 23, 1963 and directed petitioner to pay a fine of $800 to the respondents.

There can be no question on the record that petitioner received due notice of the motion citing him for contempt and appeared on the hearing of that motion. The facts of his violation of the stay provision were never contested or put in issue. A fair hearing was afforded petitioner before the District Court. He was not entitled to a jury trial. *Michaelson* v. *U. S.*, 266 U. S. 42 (1942); *In Re Debs*, 158 U. S. 564 (1895); *cf. McCrone* v. *U. S.*, 307 U. S. 61 (1939). The amount of the fine imposed by Judge Sugarman was within his discretion, and the Court of Appeals, in affirming the judgment below, found that he had properly exercised it. There is nothing in the petition to support the need for this Court to further review that discretion.

* * * * *

On all of these subjects, the petition must be viewed with great caution. It is replete with incomplete factual statements and unsupported conclusions and buttressed by inappropriately cited or inapplicable authority. It fails to raise any valid issue, and should accordingly be denied.

CONCLUSION

The petition for a writ of certiorari should be denied in all respects.

Respectfully submitted,

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May 6, 1965